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IN THE CIRCUIT COURT OF LOWNDES COUNTY, MISSISSIPPI TERESA BARKSDALE
IN VACATION, 2018 CIRCUIT CLERK

EDDIE LEE HOWARD, JR.

PETITIONER

VERSUS

CAUSE NO. 2000-0115-CV1H
MS SUP CT CAUSE NO. 2014-DR-01305-SCT

STATE OF MISSISSIPPI

RESPONDENT

ORDER

Comes now the Court in the above styled and numbered cause, and pursuant to an order issued by the Mississippi Supreme Court on August 4, 2015 in which the Petitioner was given leave to file a Motion for Post-Conviction Relief, and the trial court was directed to hold an evidentiary hearing on said motion, the Court did so hold an evidentiary hearing over the course of several days at which it heard expert testimony, and after said hearing was concluded, the parties filed briefs containing their argument. The Court, having now reviewed the Petitioner's post-conviction relief motion, the State's response, the briefs, the original trial transcript, the hearing transcripts, and all the applicable law, does hereby find as follows.

Procedural History

The Petitioner was indicted August 13, 1992 on a charge of Capital Murder.¹ Howard went to trial on May 9, 1994, representing himself since he was unhappy with the performance of his trial counsel to date.² He was found guilty and sentenced to death. This conviction was appealed and subsequently reversed and remanded on the appellate court finding that the

¹ The underlying felonies being rape and arson.

² His two attorneys remained as "stand-by" counsel during the trial.

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Defendant was not competent enough to represent himself.

The Petitioner's case was placed back on the docket and proceeded to trial for the second time on May 22, 2000.³ Howard was again found guilty and sentenced to death. The conviction was appealed and affirmed by the Mississippi Supreme Court on July 24, 2003.

In August 2003, the Mississippi Supreme Court appointed the Mississippi Office of Capital Post-Conviction Counsel (herein after referred to as MOCPCC) to represent Howard in his post-conviction relief proceedings. After several years of going through discovery and exhibits provided by the prosecutor, law enforcement, and the Circuit Clerk and conducting additional investigation, the MOCPCC filed a post-conviction relief petition. This petition was denied by the Mississippi Supreme Court on September 28, 2006.

Recently, a national organization, The Innocence Project, became aware of Howard's case and filed a Motion on his behalf to Vacate Conviction and for Post-Conviction Relief, citing newly discovered evidence and requesting leave to pursue DNA testing of biological evidence. The Mississippi Supreme Court granted leave to test biological evidence collected from the crime scene, and when testing was complete, they granted leave for the Petitioner to file his petition for post-conviction relief with the trial court. The trial court was then directed to have an evidentiary hearing on the following issue:

Whether the newly discovered evidence presented in Howard's Motion to Vacate Conviction, including the results of his post-conviction DNA testing, is of such a nature that it "will probably produce a different result or induce a different verdict, if a new trial is granted." *Crawford v. State*, 867 So.2d 196, 204 (Miss. 2003) (citing *Meeks v. State*, 781 So.2d 109, 112 (Miss. 2001)).

³ Prior to the second trial, the Petitioner's indictment was amended to reflect that he was a habitual offender. Howard has a 1972 conviction for assault with intent to ravish and a 1977 conviction for assault with intent to rape and ravish.

As stated above, the trial court did hold an evidentiary hearing over the course of several days and heard testimony from various experts. Counsel were then given the opportunity to file their argument in the form of briefs for the Court to review, which the Court has now done.

Evidentiary Hearing

The Court is going to condense several days worth of evidentiary hearings in regards to the following issues.

Issue 1: DNA Evidence

Numerous items from the crime scene were submitted to have DNA testing done, such as the victim's nightgown, the blood stained bed sheets, and the murder weapon itself, a knife. Jennifer Smith, a DNA Analyst with Orchid Cellmark, did the initial testing for biological fluids and touch DNA. She testified that of the approximately two hundred stains tested⁴, male DNA was only found contained in a sample on the blade of the murder weapon.⁵ Barbara Leal, also a DNA Analyst with Orchid Cellmark, conducted the additional testing of the male DNA found on the knife blade. Leal tested the swabs of the male DNA against that of the Petitioner and found they were not a match.

Issue 2: Bite Mark Identification

At the Petitioner's trial (first and second), testimony was given that a examination of the victim's exhumed body, using an ultraviolet light, revealed three recent bite marks. The State's

⁴ Testimony was that not all identified stains were tested; instead a representative portion was tested.

⁵ Some speculation was made that even with the advances in DNA procedures, testing after almost twenty-five years and numerous handlings of the evidence during the two trials could affect sample results.

expert Dr. Michael West used dental molds of the Petitioner's teeth to create bite marks on the same areas of the victim's body, photographed, using ultraviolet light, the bite marks created by the mold, then compared them to the photos of the original teeth marks. In the case of two of the bite marks, West could only opine that the mark was "consistent" with the bite of Howard, meaning he was not excluded as being the biter, but he also could not be identified positively as being the person who made the bite. In regards to the third bite mark, however, West testified:

Do I have any doubt these teeth made that bite on her breast? I don't have any. I myself am satisfied that these teeth made that mark. Now does someone else share that opinion, I don't know. Since I violated the standards of terminology in ninety-four that were nonexistent, they drafted them in ninety-five and accepted them in ninety-six, I try to stay within the guidelines for standard terminology. Today I would say, reasonable medical certainty, these teeth of Mr. Howard left that bite mark on the breast of Mrs. Kemp. (*Howard II* Trial Transcript, Page 584)

The majority of the post-conviction evidentiary hearing centered on discrediting both Dr. West, in his role as a forensic odontologist, and the techniques that West had used in identifying the Petitioner's bite mark on the victim in 1992. As science and technology have progressed in the twenty-six years since this crime occurred, the standards for bite mark identification have changed also. Petitioner's post-conviction counsel procured three witness to testify as to these changed standards at the evidentiary hearing: 1) Dr. Iain Pretty a professor of dentistry, from the University of Manchester in the United Kingdom; 2) Dr. Mary Bush, a professor of restorative dentistry from the University of New York in Buffalo; and 3) Judge Christopher Plourd, a lay witness, currently a judge in the Superior Court in Imperial County, California. The Court, taking judicial knowledge that the curriculum vitae of these individuals are filed in the court file and, no doubt, a copy of the transcript of the evidentiary hearing in its entirety will be designated and filed as part of the appeal record, will very briefly summarize the pertinent factors to be

gleaned from their testimony as follows.

- 1) Dr. Pretty - Has made a study of bite mark identification as a science and concludes that it can only be used to exclude potential biters.
- 2) Dr. Bush - Conducted a study in which dental molds mounted on vice grips were used to bite human cadavers, then photographed results; concludes that dentition may not be measurably unique.
- 3) Judge Plourd - While still in practice as a defense attorney in 2001, he conducted his own blind proficiency test in the area of bite mark identification. Plourd sent Dr. West a photo of a bite mark made by one individual⁶ and a dental mold from a different individual to conduct a preliminary bite mark comparison. Dr. West incorrectly identified the owner of the teeth mold as the biter.

The State called Dr. West as its expert at the evidentiary hearing who, contrary to what he may have stated in an earlier deposition referred to by Petitioner's counsel, confirmed that validity of his ultraviolet photography technique and stuck with his original conclusion that the Petitioner was the possessor of the teeth the created the bite mark on Georgia Kemp's right breast.

Case Law

The case given to this Court as its standard of review in this post-conviction proceeding is that of *Crawford v. State*, 867 So.2d 196 (Miss. 2003). *Crawford* was a capital murder/death

⁶ This was a regular crime scene photo, not one made using ultraviolet light.

penalty post-conviction relief case in which, among other claims, the petitioner alleged to have newly discovered evidence of a previously undisclosed F.B.I. report⁷. The Mississippi Supreme Court found thus:

Post-conviction review is a limited proceeding whereby this Court will only review “those objections, defenses, claims, questions, issues or errors which in practical reality could not or should not have been raised at trial or on direct appeal.” quoting *Cabello v. State*, 524 So.2d 313 at 323 (Miss. 1988). Claims and theories that could have been but were not presented to the trial court or to this Court on direct appeal are procedurally barred from being reviewed by this court on post-conviction review. citing *Lockett v. State*, 614 So.2d 888 (Miss. 1992) Likewise, all issues, both factual and legal, that were decided at trial and/or on direct appeal are barred from review as *res judicata*.... [T]he petitioner must show cause for not having already brought the claim and that this caused actual prejudice to his case... [P]etitioner must show that his claim is so novel that it has not previously been litigated or that an appellate court has suddenly reversed itself on an issue previously thought settled.... Petitioner will also defeat procedural bar if he can demonstrate that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. (*Crawford* 202)

In regards to the specific claim of newly discovered evidence, the Mississippi Supreme Court found:

To succeed on a motion for new trial based on newly discovered evidence, the petitioner must prove that new evidence has been discovered since the close of trial and that it could not have been discovered through due diligence before the trial began.... In addition, the petitioner must show that the newly discovered evidence will probably produce a different result or induce a different verdict, if a new trial is granted. This requires a showing that the evidence is material and is not merely cumulative or impeaching. (Id. 203-04)

It is with these standards of review in mind, this Court reviewed the evidence and testimony given at the evidentiary hearing, and the briefs of the parties, and now makes its ruling.

⁷ The petitioner’s post-conviction motion was denied with the Supreme Court finding “the [petitioner] failed to show that the F.B.I. report at issue would have even a significant effect on his trial, much less the type of effect necessary for success in this petition.” (*Crawford* 219)

Legal Conclusions

Concerning the issue of DNA evidence, the Court finds that the absence of the Petitioner's DNA in the items tested is not new evidence that would "produce a different result or induce a different verdict." *Crawford v. State*, 867 So.2d 196, 204 (Miss. 2003) While no DNA evidence was found that implicated the Petitioner in the crime, no DNA was found that pointed to a different perpetrator. The lack of evidence linking Howard to the crime scene⁸ was used in argument to the jury by Petitioner's defense counsel in his second trial, and the Court granted a defense jury instruction that instructed the jury to find Howard not guilty if there was reasonable doubt he was not present and did not commit the crime. Therefore, the Court finds that a new trial should not and will not be granted on the issue of lack of DNA evidence linking Petitioner to crime scene.

As to the issue of bite mark evidence, the Court finds that the criticism of Dr. West, and his methods, that comprised the majority of the evidentiary hearing is very familiar territory for this Court. In the Petitioner's second trial, Defense Counsel Tom Kesler extensively voir dired on West's qualifications as an expert, pointing out his year-long suspension from the American Board of Forensic Odontology; the fact that a Defendant in Louisiana was granted a new trial after the presiding judge threw out the evidence presented by West; and another case where a Defendant identified by West as the biter/attacker was cleared by DNA evidence, and the Defendant was released (*Howard II* Trial Transcript 542-46). Kesler continued this line of

⁸ DNA testing was not originally done on any crime scene items since the Mississippi Crime Lab did not have that capability in 1992; rather they checked for fingerprints, seminal fluid, blood type, and ethnic make-up of hairs. Leave was given to the MOCPCC to seek DNA testing in preparation for Howard's first petition for post-conviction relief, but no testing was done at that time.

attack in his cross examination. Kesler referred again to West's suspension from the American Board of Forensic Odontology and cited that the suspension was in part because West "failed to act in a impartial manner." (*Id.* 564) Kesler also brought up the fact that West resigned from the American Academy of Forensic Science just prior to being expelled due to an allegation that he lied in court, then West later dropped a lawsuit refuting that same allegation that he had brought against the Board (*Id.* 579-81). In addition, Kesler referenced a case in neighboring Clay County, Mississippi that had its conviction overturned because West threw away evidence (*Id.* 585-86). Kesler finished with these closing argument statements: "Well, the State foreshadowed that Doctor West was going to get attacked, and he was exactly right." (*Id.* 630)

[Bite mark identification] is a tool of exclusion, not – not reliable for identification. You know, he's got some other problems even on top of that. He, uh—I'd heard this one before, but it—it astounds me every time I think about it –is when he's asked about his, uh, margin of error rate, whatever it is, and he said there is none, and in Louisiana, as he told you today, he told the court down there that it was something less than Jesus Christ. Ego; that's not ego, ladies and gentlemen, that is arrogance, and it's arrogance that translates into a so-called scientist who is not a scientist. He's a—he should be working in a circus doing tricks to amuse the crowd for pay. (*Id.* 632)

"[T]he problem with this case, ladies and gentlemen comes back to Doctor Michael West." (*Id.* 635)⁹

Presiding Justice McRae took up the criticism of West and his methods in his dissent in *Howard v. State*, 853 So.2d 781 (Miss 2003).

The "expert odontology testimony" of Dr. West should not have been submitted to the jury as it is "junk science" and not generally accepted by the scientific community as required by then Rule 702 of the Mississippi Rules of Evidence and *Fyre v. United States*,

⁹ Kesler put on the record at the end of the case that the trial court had given Defense Counsel leave to seek, and funding for, a defense expert in the field of forensic odontology; however, the defense chose not to do so after a preliminary consultation with Dr. Richard Souviron revealed that his opinion would most likely coincide with Dr. West's. (*Howard II* Trial Transcript 598-600)

293 F. 1013 (D.C. Cir. 1923). Likewise, neither Dr. West nor his “junk science” meet the standards and requirements for admission under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), and revised Rule 702 of the Mississippi Rules of Evidence.... Bite mark identification is not a reliable discipline and lacks generally recognized criteria or methodology. This Court has recognized that there are serious disagreements in the forensic scientific community about whether a defendant can be uniquely identified on the basis of teeth marks.... Areas of bite mark identification which are still the subject of disagreement in the forensic odontology community include: (1) the timing of the bite mark injury; (2) enhancement procedures and techniques (such as the use of ultraviolet light); (3) the type of matter for test bites or the accuracy of test bites under various mockup conditions; (4) the pressure necessary to produce the various levels of tissue injury under normal and unusual circumstances; (5) manipulation of and various types of distortion to produce correction; (6) whether in fact another set of teeth could have produced the same or similar marks; (7) no universal agreement on which injuries are bite mark related; and (8) research on the minimum number of point of concordance or the minimum number of teeth marks needed in a bite mark for certainty is also not well established Additionally, Dr. West himself has been a controversial character in the field of forensic odontology. On several occasions, Dr. West has been held to have exaggerated the reliability of his disciplines and has proceeded to testify outside the scope of his expertise. (*Howard II* 799-800)

Justice McRae then posed the question: “With these revelations, how can this Court stand by and allow Dr. West to testify and give an opinion as an expert to procedures, methodology, and testing which have not been adopted by his own scientific community?” (Id. 801)

Dr. West and his shortcomings were again one of the main topics in Petitioner’s first Motion for Post-Conviction Relief filed by the MOCPCC (*Howard v. State*, 945 So.2d 326 (Miss. 2006). The Petitioner first mentioned West concerning the Issue of Ineffective Assistance of Counsel, based on the allegation that defense counsel had been “ineffective in not obtaining a bitemark expert to debunk the testimony of Dr. Michael West.” (*Howard III*, 348) Petitioner produced affidavits from Dr. Richard Souviron which he felt constituted newly discovered evidence, which would except the issue from being procedurally barred. Souviron stated in part:

Had I been retained by Mr. Kesler, I would have been able to provide proper background information to voir dire Dr. West ... Dr. West’s statements during voir dire were either

half true or misleading. If the facts had been known, Mr. Kesler would have been able to prove “the spin” Dr. West’s placing on his expulsion from ABFO, the American Academy of Forensic Sciences and the International Association of Identification [T]he pattern injuries that were interpreted as bite marks by Dr. West *were not bite marks* in the Keko case, the Brewer case, the Brown case, or the Harrison case Had Mr. Kesler asked, I would have been able to provide background information that Mr. Kesler was not aware of with regard to Dr. West’s qualifications, Dr. West’s reasons for suspension from the American Board of Forensic Odontology. (Id. 351)

In regards to this issue, the Mississippi Supreme Court found that while the “failure to call an expert witness was deficient performance,” no prejudice to the defense was proven so there was no ineffective assistance of counsel; they further stated:

In support of his post-conviction claim, Howard has offered numerous expert affidavits and other documents which attack Dr. West, his testimony, and bite mark evidence in general. These affidavits and other documents point out how many times Dr. West has been proven wrong and they discuss how unscientific his methods are. One affidavit even states that Dr. West made a mis-diagnosis in Howard’s case, but, it does not go on and opine that Howard did not bite Kemp. Just because Dr. West has been wrong a lot, does not mean, without something more, that he was wrong here. (Id. 352)

Petitioner next PCR issue referencing West was “Whether the *Daubert/Kumho* Gate-Keeping Functions Apply in State Death Penalty Cases.” The Mississippi Supreme Court found this issue was addressed in the direct appeal and stated:

In fact, Howard’s argument in his petition echoes the dissenting opinion in his direct appeal We find that this issue is barred by the doctrine of res judicata and is barred from re-litigation by Miss. Code Ann. § 99-39-21(3). “Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of res judicata. The Petitioner carries the burden of demonstrating that his claim is not procedurally barred.” quoting *Jackson v. State*, 860 So.2d at 660-61 (Id. 368-69)

Petitioner’s final issue of his first PCR was “Whether Petitioner Was Denied Due Process and a Constitutionally Fair Trial Due to the Alleged Falsehoods, Misrepresentations, and Perjured Testimony by Dr. Michael West.” Petitioner contended that West’s testimony was “‘replete’ with ‘instances of false, incorrect and/or misstatements of fact’ ‘The jury could not make an

informed decision when the information supplied to them was false.”” (Id. 370) While finding that this issue was procedurally barred since it could have been raised on direct appeal, the Mississippi Supreme Court further found that it was without merit anyway:

Howard specifically points to four of Dr. West’s statements and contends they were false. Each of those statements are regarding Dr. West’s background and competence as an expert. Those statements are not regarding his ultimate conclusion that Howard bit Kemp. At trial, defense counsel spent a significant amount of time examining Dr. West both during voir dire and cross-examination. The jury heard ample information regarding Dr. West’s credibility, or lack thereof. Even if these statements were false, it is not reasonably likely that they “affected the judgment of the jury.” quoting *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000) at 756 (Id. 370-71)

So, as stated previously, this Court, and the Mississippi Supreme Court, should be very familiar at this point with the criticism of Dr. West and his methodology. This very familiarity however means that this is not new evidence; it is rather just further impeachment of West’s character and his techniques. A jury heard extensively that West was not the most reliable of witnesses and that his techniques, and actually the very science of bitemark identification, was questionable. The Mississippi Supreme Court reviewed this same issue on direct appeal and still affirmed the Petitioner’s conviction, with Justice McRae writing a dissent that eerily echoes Petitioner’s current argument. The Mississippi Supreme Court again reviewed the troublesome issue of Dr. West during Petitioner’s first Petition for Post-Conviction Relief, and the appellate court denied that Petition, again upholding Petitioner’s conviction. What the Mississippi Supreme Court has not done is to find that bitemark identification is inadmissible as evidence and that Dr. West should not be allowed to testify in the trial courts of this state, and trial courts are without the authority to change the law as pronounced by the Mississippi Supreme Court. What the Petitioner has not done is present any new evidence regarding Dr. West or his bitemark

identification that would constitute "newly discovered evidence [that would] probably produce a different result or induce a different verdict, if a new trial is granted. This requires a showing that the evidence is material and is not merely cumulative or impeaching." (*Crawford* 204)

Court's Ruling

The Court finds that it conducted an evidentiary hearing pursuant to Mississippi Supreme Court mandate and heard no new evidence of such a nature that it would produce a different result or induce a different verdict, if a new trial was granted. THEREFORE, the Petitioner's Motion for Post-Conviction Relief is denied.

The Circuit Clerk is directed to forward a copy of this Order to all parties including the Clerk of the Supreme Court.

SO ORDERED this the 8th day of October, 2018.

Jessie Howard
CIRCUIT JUDGE

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OCT 10 2018
Jessie Barksdale
Circuit Clerk